D2

U.S. Department of Justice

Immigration and Naturalization Service

[redacted]

*OFFICE OF ADMINISTRATIVE APPEALS*
*425 Eye Street N.W.*
*ULLB, 3rd Floor*
*Washington, D.C. 20536*

[redacted]

File: LIN-01-209-50968 Office: Nebraska Service Center Date: JUN 21 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a healthcare business with 45 employees and an approximate gross annual income of $4 million. It seeks to extend its authorization to employ the beneficiary as a staff physician for a period of three years. The director determined the petitioner had not established that the beneficiary was eligible for any further extensions.

On appeal, counsel submits additional information.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The director denied the petition because the petitioner had not presented any evidence that the beneficiary is qualified for any extension of status beyond the six-year allotted time frame. On appeal, counsel submits a copy of a letter dated January 27, 2000, from the Labor Certification Unit Manager of the Michigan Department of Career Development, who states, in part, as follows:

> This is to acknowledge receipt of the **Application for Alien Employment Certification**. The priority date of the application is **1/25/2000**.

Section 104(c) of the American Competitiveness in the Twenty-First Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1251 (AC21) enables H-1B nonimmigrants with approved I-140 petitions who are unable to adjust because of per-country limits to be eligible to extend their nonimmigrant status until their application for

adjustment of status has been adjudicated. The record, however, contains no evidence that at the time of the filing of the present petition, the petitioner had an approved I-140 petition on behalf of the beneficiary.

Section 106 of AC21 also permits H-1B nonimmigrants to obtain an extension of H-1B status beyond the 6-year maximum period, when:

> (a) the H-1B nonimmigrant is the beneficiary of an employment based (EB) immigrant petition or an application for adjustment of status; and
>
> (b) 365 days or more have passed since the filing of a labor certification application, Form ETA 750, that is required for the alien to obtain status as an EB immigrant, or 365 days or more have passed since the filing of the EB immigrant petition.

Although the record contains a letter from the Labor Certification Unit Manager of the Michigan Department of Career Development, indicating that the priority date of the beneficiary's Application for Alien Employment Certification is January 25, 2000, the record contains no evidence that the beneficiary is the beneficiary of an employment based (EB) immigrant petition or an application for adjustment of status. Nor does the record contain a copy of the petitioner's Form ETA 750 that was filed on behalf of the beneficiary. In view of the foregoing, the petition may not be approved.

Beyond the decision of the director, the petitioner's labor condition application was certified on July 11, 2001, a date subsequent to June 27, 2001, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

**ORDER:** The appeal is dismissed.